YEAP NAH KHE & ORS

v.

TYE CHO CHUN & ANOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
DENIS ONG JCA
[CIVIL APPEAL NO: P-02-615-1997]
1 DECEMBER 1998

LAND LAW: *Sale of land - Order for sale - Reserve price - Whether can be relitigated - Non-joinder of party - Whether a sufficient reason - Whether an abuse of process of court*

The defendants, as executors and trustees of the deceased's estate, had earlier issued Originating Summons No: 24(34)-642-88 seeking the consent of the court to sell the properties of the estate. At that time, however, one of the beneficiaries of the deceased ('the 2nd deceased') had already passed away. With the consent of all the parties, the court ordered the sale of the properties at the reserve price of RM9.5m. After several unsuccessful attempts to auction the properties, the court ordered them to be sold by private treaty for RM9.5m. The plaintiffs appeared to have agreed to the order for sale as they did not appeal against it but, subsequently, filed an application to recall the order for sale to enable the court to consider an alternative valuation report. The court rejected this application and there was no appeal. The sale was subsequently completed and the proceeds thereof were distributed to all the beneficiaries.

Subsequently, the plaintiffs (the 1st plaintiff being the widow of the 2nd deceased) filed Originating Summons No: 24-580-96 seeking directions on whether to institute proceedings against the defendants for damages for negligence and for breach of fiduciary duties as executors and trustees of the deceased's estate. This application was dismissed. In the instant appeal, the plaintiffs argued that the widow of the 2nd deceased was not made a party in Originating Summons No: 24(34)-642-88 and that the defendants' valuers and brokers might not have taken all relevant factors into consideration in the valuation of the properties resulting in them being grossly undervalued.

Held:
Per Shaik Daud Ismail JCA

[1] The fact that the widow of the 2nd deceased was not made a party in Originating Summons No: 24(34)-642-88 was not a reason to relitigate the reserve price. The widow of the 2nd deceased was not a beneficiary of the deceased and she had chosen not to intervene as she had knowledge of the matter. In any case, by virtue of O. 15 r. 6(1) of the Rules of the High Court 1980, the non-joinder had not affected the issue before the court.

[2] The actual purpose of the plaintiffs' application was to relitigate the issue of the reserve price of the properties, which issue had been litigated four years earlier. It was, therefore, an abuse of the process of the court.

[Appellants'/plaintiffs' appeal dismissed.]

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 6(1)

For the appellants - Tan Beng Hong; M/s Tan Beng Hong & Co
For the respondents - Stella Lau Chow Ong; M/s Lim Kean Siew & Co

[Appeal from High Court, Pulau Pinang; Originating Summons No: 24-580-96]

Reported by Michele Saw

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal against the decision of the Penang High Court which had on 8 September 1997 dismissed an Originating Summons issued by the appellants. The appellants had filed an Originating Summons dated 6 July 1996 against the respondents seeking, *inter alia*, directions whether the appellants, as Executors and Trustees of the Estate of Tye Kee Yoon @ Tai Hi Yoon, deceased, should or should not institute and prosecute an action against the respondents claiming damages for negligence and for breach of their fiduciary duties as Executors and Trustees of the said estate in relation to the sale of the property known as Holding No. 448, Town subdivision 4, Northern District Penang together with all the buildings erected thereon and for all necessary and consequential directions thereon.

This matter in fact has a long and protracted history. The deceased Tye Kee Yoon @ Tai Hi Yoon (1st deceased) died in 1919 and proceedings in respect of the estate of the deceased began in 1956.

In 1988 the Executors and Trustees of the estate had issued an Originating Summons No. 24-642-88 to obtain consent of the court to sell the property of the estate. In that Originating Summons, the present respondents were plaintiffs and the 2nd and 3rd appellants were defendants No. 17 and 18. Tye Kim Yuen one of the beneficiaries of the deceased, had died in 1982 (2nd deceased). He left a will in which he named his widow (the present 1st appellant) and two of his sons (2nd and 3rd appellants, respectively) as Executors and Trustees. His share of the estate of the 1st deceased was given to seven of his sons. All the seven sons of the 2nd deceased had been named as defendants Nos. 15, 17, 18, 19, 20, 21 and 22.

Originating Summons 24-642-88 had been personally served on all defendants and at the same time the court ordered that it be advertised in three major local newspapers with a request that any interested party could come forward and stake their claim.

On 14 July 1992 with the consent of all parties, the court gave an order of sale of the said property on a reserved price of RM9.5 million. The auction of the said property was fixed on several occasions but on all occasions there were no bidders. Finally on the application of all the plaintiffs in the said Originating Summons, the court on 28 October 1993, ordered that the said property be sold by private treaty to Malaysia Vegetable Oil Refinery Sdn. Bhd. for RM9.5 million. It cannot be gainsaid that this order was given by the court after hearing counsel for all parties and after considering valuation reports tendered. The defendants appeared to have agreed with the order as they did not appeal.

Then on 30 October 1993, one of the defendants ie, the 17 defendant, (who now is the 2nd plaintiff), filed an application for an order that the court recall 28 October 1993 order "for the purpose of enabling the court to consider an alternative valuation report to be submitted by C.H. William, Talha and Wong Sdn. Bhd." The court rejected this unusual application on 11 November 1993 and again there was no appeal.

The sale of the said property was completed on 26 April 1994 and the court was informed that almost all the proceeds of sale had been distributed to all the beneficiaries. What remained to be distributed are the shares of those who disagreed. It must be borne in mind that by this time 80 years had passed since the death of the 1st deceased.

Some two years after the sale, on 6 July 1996 the present plaintiffs filed this Originating Summons 24-580-1996 claiming to be the Executors and Trustees for the 2nd deceased. After a careful study it can be seen that the present 1st plaintiff is the widow of the 2nd deceased and she is not a beneficiary of the estate of the 2nd deceased deriving from the estate of the 1st deceased. 2nd and 3rd plaintiffs are in fact the 17th and 18th defendants in the Originating Summons 24-642-88, and if it can be remembered, it was the 2nd plaintiff (as the 17th defendant before) who applied to recall 28 October 1993 order of sale by his application dated 30 October 1993, which application was dismissed, but he did not appeal against that dismissal.

First and foremost, the present application appears to have been made under the Trustees Act 1949 and the Rules of the High Court 1980 but nowhere it is stated under which particular provision of the Trustees Act 1949 or under which Rules of the High Court 1980 it is made. Learned Counsel for the appellant conceded that the heading of the application which mentions the Trustees Act is in fact wrong. Secondly, the application is seeking a direction to institute proceedings against the respondents for damages for negligence and for breach of their fiduciary duties as Executors and Trustees of the estate of Tye Kee Yoon @ Tai Hi Yoon in relation "to the sale of the property ...". Read in its proper context we agree that the application is nothing more than a challenge to the sale *vis-a-vis* the price at which the said property was sold. This is borne out by the affidavit in support of the application sworn by one Datuk Tai Tsu Kuang @ Tye Tsu Hong, the 2nd appellant. At para. 5 therein he deposed that he verily believed the property is worth substantially more than the reserved price of RM9.5 million and according to another independent firm of valuers the said property is worth RM16.245 million. At para. 7 thereof he deposed that it was his belief that the said property is substantially worth more than the reserved price from various articles and reports published in the news media during the relevant period. At para. 8 he deposed that he began to express his deep concern to the respondents that their valuers and brokers M/s Jones Langwooton might not have taken all relevant factors into consideration in their valuation of the said property. At para. 10 he deposed that he had consistently maintained that the said property had been grossly undervalued.

From all these averments, it cannot be denied that the actual purpose of the application was nothing more than a challenge to the reserved price of the said property. It cannot be said that the learned judge was wrong when he held that the actual purpose of the application was to challenge the reserved price of the said property. It cannot be gainsaid that on 14

July 1992, it was with the consent of all parties that the very same court had ordered the sale of the said property at the reserved price of RM9.5 million. That in fact was not the one and only time the issue of the reserved price had come up before the court. It came up on two other occasions. On the second occasion on 28 October 1993, it was on the application of all the plaintiffs in the Originating Summons, the same court ordered the said property be sold by private treaty to Malaysian Vegetables Oil Refinery Sdn. Bhd. at the reserved price of RM9.5 million. This was in fact made after the court had heard all parties. Two days later on 30 October 1993, one of the defendants ie, the 17th defendant, who now is the 2nd plaintiff, filed an application for an order that the court recall its 28 October 1993 order, for the purpose of enabling the court to consider an alternative valuation report.

After hearing all parties the court dismissed the application. On all three occasions no appeal was filed to challenge the value of the said property.

One of the issues brought up by the appellants is that the widow of the 2nd deceased was not made a party in the Originating Summons No. 24-642-88. This is hardly a reason to relitigate the issue of the reserved price. She was in fact not a beneficiary of the 1st deceased and she chose not to intervene as she had knowledge of the matter. In any case by virtue of O. 15 r. 6(1), Rules of the High Court 1980, the non-joinder has hardly affected the issue before the court.

We agree with the learned judge that the actual purpose of the said application was to relitigate the issue of the reserved price of the said property which issue had been litigated by the court four years earlier. This is borne out very clearly by the affidavit in support of the application. Therefore it is an abuse of the process of the court. We dismissed the appeal with costs and ordered the deposit to go towards account of taxed costs.